1980

Eldon E. Rasmussen v. United States Steel Company, a Corporation : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ELDON E. RASMUSSEN,
Plaintiff and Respondent,

vs.

UNITED STATES STEEL COMPANY, a Corporation,
Defendant and Appellant.

Case No. 8081

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Respondent has no serious dispute with the statement of the case as made by Appellant, however there are a few statements which should be clarified. The introductory statement asserts that the claim of the

Respondent was for an amount over and above the compensation established by an express contract. There is no mention in the record which the Respondent can find wherein there was ever any reference or discussion of an express contract. It is assumed that at the time of initial employment there was an agreed rate of compensation, after which periodic raises were paid to Respondent. There was no mention or reference to any specfic discussions concerning the rate of pay after the initial employment. The Respondent is not therefore attempting to recover in the face of an express contract agreed upon by the parties fixing the rate of pay; but rather, it is the Respondent's contention that there was only one contract and that was an implied in fact contract to the effect that the Respondent would receive, in addition to the amount currently paid, retroactive payments to be determined after the completion of the job reevaluation study hereinafter mentioned.

The first paragraph at top of Page 2 of the Appellant's brief refers to a distinction between employees located in what they call the plant area as contrasted with general office employees, and further states that those employees within the plant were all represented by labor unions and therefore their terms of employment were dictated by negotiated contracts with the union. There was one group of salaried employees similar to general office employees, working in the plant area not represented by a labor union for whom a job evaluation program was completed and payments were made in

identically the same manner as payments were made to those who were represented by the unions. (R. 71)

The second paragraph on Page 2 of the brief states that the job evaluation program was commenced as a result of an agreement with the CIO and various subsidiaries of the United States Steel Co. Exhibit P-1 and Exhibit P-14, Page 33, as published in the United Steel News, the official publication of the defendant company, states that the job evaluation or inequity study was ordered by the National War Labor Board in November, 1944. The job evaluation program as discussed in said exhibits was established to accomplish the following: "1. Describe simply and concisely the content of each job in the bargaining unit; 2. Place the jobs in their proper relationship; 3. Reduce the job classifications to the smallest practical number by grouping those jobs having substantially equal content; and 4. Eastablish appropriate rates and methods of pay for the job as grouped within their respective job classifications." As explained in Exhibit P-1 the program in addition to the above mentioned objectives was set up to eliminate inequities in pay scales between positions within the same subsidiary wherein the position called for comparable skill and training, and also to eliminate inequities as between subsidiaries where the position required employees to do substantially the same or comparable work. How the program was to be conducted and carried out is explained in detail in said exhibits.

The program at the Geneva Plant was first completed as to the wage and hourly workers in the mill and

thereafter was applied to two groups of salaried employees in the mill; one group represented by a bargaining unit and the other group of salaried personnel not represented by a bargaining unit. Thereafter the program was conducted as to the salaried employees in the general office. (R. 66-68) There was only one difference in the general operation of the program as it applied to the four groups of employees. According to the Appellant, general office employees were required to be on the payroll on the effective date of the program. As to the other three groups of employees this requirement was not specified and upon application the employees would receive their retroactive pay even if they had terminated their employment with the company. (R. 72)

The contention of the Respondent was that there had been a usual practice and custom to grant to non-union employees the same or comparable pay benefits at or near the same time as benefits were awarded to union employees. Two regular salary incerases were so received by the Respondent during his course of employment until the date of July 16, 1948. (R. 51) At that time in announcing a pay increase, mention was made of the job evaluation program to be applied to non-exempt salaried personnel comparable to the program commenced for the wage and hourly employees. (Ex. P-3) No further increase of a general nature was granted to any group of employees until December 1, 1950 (R. 136), approximately two and one/half years after the

announcement in July, 1948. It was the Respondent's contention that based upon the custom and implications of the job evaluation program the employees were led to believe and to rely upon the assertions that retroactive pay would be made to them at the completion of the evaluation program.

Since the first point relied upon by the Appellant challenges the sufficiency of the evidence to support the verdict of the jury and the judgment entered thereon, a more detailed examination of the evidence in support of the Respondent's claim will be made in the argument.

STATEMENT OF POINTS

POINT ONE

There is substantial competent evidence of an implied contract to the effect that the Appellant would pay to Respondent retroactive pay as determined by the job evaluation program.

POINT TWO

The court did not err in admitting evidence of acts by the company subsequent to November, 1950, nor did the court err in giving instruction No. 10 pertaining to evidence of acts of the employer subsequent to November, 1950, at which time plaintiff's employment had ceased.

ARGUMENT

POINT ONE

There is substantial competent evidence of an implied contract to the effect that the Appellant would pay to Respondent retroactive pay as determined by the job evaluation program.

Although the Appellant recognized the elementary rule that in an appeal from a jury's verdict the evidence must be reviewed in the light most favorable to the Respondent, Appellant thereafter proceeds to review and emphasize the evidence most favorable to the Appellant. It is therefore respectfully submitted that the evidence most favorable to the Respondent is as follows:

The first witness called by the Respondent was James L. Dillon, Superintendent of Industrial Relations for the Appellant during the time in question. (R. 59) He testified that he had been with the Appellant and its predecessor Corporate Organization since the inception of its operations as a steel plant in the State of Utah. (R. 60) In connection with general pay increases to union and non-union employees Mr. Dillon testified as follows:

"Q. You were then with the plant almost from the time of its inception?
A. From the time it started operations.
Q. From the time it started operations, and during that period of time were pay increases given—put that, were general pay increases granted Union employees, and non-Union employees at or near the same time?
A. Yes.
Q. Were those pay increases, although not actually the same, were they comparable, and corresponding anywhere near to the pay increases granted Union Employees?
A. Yes.
Q. Has it been the policy of the Company, through the period of time that you were

there, to grant general increases, and we have discussed both as to time and comparable in amount, to employees, whether they were in Unions, or not in Unions?

A. Yes.

Q. Do you remeber, or know, of any instance when that policy or procedure was not followed?

A. No, I don't recall any particular instance where it was not followed." (R. 60-61)

Mr. F. Ray Friedley, who had been with the Appellant and the predecessor companies since the commencement of operations in 1944, was Assistant Comptroller until June 30, 1950 and thereafter was the comptroller of the Appellant was called as a witness. Mr. Friedley, as chairman of the salary administration committee, which committee had the direct supervision and jurisdiction over the job evaluation program, testified concerning the custom of the company as it applied to pay increases for union and non-union employees as follows:

"Q. Now, during the period of time that you were there, had the company usually granted pay increases or pay benefits—by that, I mean general increases to non-union employees on the same basis, or a comparable basis of time and percentage, as they had to union employees?

A. So far as the dates are concerned, that is correct, so far as the rates of pay or general increases are concerned, they would differ, of course.

Q. They will differ in exact amounts to any one

employee, but the general, all-over increase was just about the same, was it not?

A. Well, general increases being related usually to cost of living increases, yes, the treatment would be similar.

Q. Has that been true of all of the time you have been working with that company?

A. That is correct.

Q. Do you know of any instance where that did not generally follow?

A. Now, you are referring to general increases, of course?

Q. Yes, general increases?

A. Again, I will state, so far as the dates are concerned, I know of no exceptions to that, and so far as my statement on amount, there would be no exception to that." (R. 97, 98)

Mr. Torvall Nelson, an employee of the Appellant in the engineering department and classified as a general office employee, commenced working for the company on December 2, 1946 and was still working with the company at the time of trial, testified as to a general custom as follows:

"Q. During that period of time up to the present time, would you say there is a policy, general procedure or custom in respect to making general pay increases? Answer "yes" or "no". *****

A. Yes.

Q. I used a lot of terms, custom, policy, procedure, what would you call it in your own words, the plan we are talking about?

A. I would say it was customary.

Q. Well, what is customary?
A. For instance, the hourly people would receive a blanket increase, sometime following that, maybe two or three weeks, by the general office personnel would receive an increase somewhat similar to it.
Q. Would it usually be effective as to the same date, the hourly increase was granted, and announced late on?
A. Usually earlier.
Q. The amount received, how would you describe that?
A. Similar.
Q. Has that always been the case?
A. Since I came to work there, it always has been more or less an established procedure." (R. 126)

Alton Sumsion, an employee in identically the same department in which the Respondent worked, was called as a witness and testified concerning the custom of the Appellant in connection with pay increases as follows:

"A. Usually, or as far as I know always when a bargaining unit has negotiated an increase, a similar increase has also been extended to the salaried people.
Q. That is true to all types of pay benefits, is that right?
A. That is right.
Q. Did you receive your retroactive pay for that period of time?
A. Yes, I did.
Q. And did you report that as wages earned, did you?
A. Yes." (R. 132)

The Respondent likewise testified as to the existence of the custom mentioned above. (R. 126)

The Respondent commenced working for the Appellant or predecessor on January 20, 1947 (R. 136) and thereafter received a general increase as did all of the employees whether union or non-union on April 1, 1947 and July 16, 1948. (R. 51) Thereafter the Respondent did not receive any general pay increase from said date in July, 1948 up until the time of terminiation on November 30, 1950. (R. 136)

In connection with the pay increase made effective July 16, 1948, an announcement was made as follows:

> "Nonexempt Salaried Personnel
>
> *All salaried employees* classified as nonexempt under the provisions of the Fair Labor Standards Act *and members of plant personnel* shall receive a salary increase effective July 16, 1948, amounting to $17.00 per month, representing the monthly equivalent of 9½¢ minimum hourly rate increase granted wage earners. *A salary rate inequities program will be undertaken with respect to said nonexempt salaried positions comparable to the inequities program recently completed for wage earners.* An increase increments cost comparable to that granted wage earners will be reserved for distribution through retroactivity of the salary rate inequities program for the period commencing July 16, 1948." (Ex. P-3) (Emphasis added).

Although the Appellant does not challegen the fact that the Respondent was a non-exempt salaried person-

nel, it contends that this notice did not apply to the Respondent since it was addressed to all plant department heads. Attention is called to the notice which states, "All salaried employees * * * and plant personnel * * *". If the notice was only to apply to employees in the plant it would seem unnecessary to make the distinction cited above. The reference to plant personnel cannot be construed as applying to non-salaried employees, since the notice announces the salary increases as being the equivalent of 9½¢ minimum hourly rate increase granted to wage earners. Both the Respondent and the witness Torvall Nelson, who worked in the general office in the engineering department, testified that they had seen the announcement and, since they were non-exempt salaried personnel, understood the announcement as applyig to them. (R. 128) That such a program was discussed in 1948 and 1949 as to general office employees was verified by Mr. Dillon, Superintendent of Industrial Relations. (R. 77) The purported distinction between the plant and general offices will be further discussed in argument of the next point.

The announcement of the pay increase and the job evaluation program contained in the letter of August 3, 1948 referred to the job evaluation program which had been completed as to wage and hourly mill employees. (Ex. P-3) On June 25, 1948 a joint news release was made to the public press which stated that back pay to mill employees at the Geneva Plant would be paid in the near future and that the retroactive date was determined as March 9, 1947. (Ex. P-2)

Mr. Dillon testified that the first activity in connection with the job classification program was commenced as it applied to the Geneva Plant in 1947 and was made effective on April 18, 1948. (R. 66) Thereafter a similar program was commenced as to salaried employees in the mill in the fall of 1948 but that this program was discontinued temporarily when some of the employees in that classification affiliated themselves with a bargaining unit or labor union. However, the program was carried on after the employees were unionized and was finally made effective November 19, 1950. (R. 66-67) The program as it applied to general office employees commenced in September, 1950; the job classifications were approved and completed in March, 1951; and the program was put into effect on June 3, 1951. (R. 50, 69) It was explained that there were only so many industrial engineers who could work and complete the pob descriptions and thereafter the accounting department had to compute the retroactive pay based upon the new job classifications, and due to limited help only one program could be carried on at a time.

In July, 1950 an announcement was made in the Provo Herald that clerical workers at Geneva would have placed in effect as to their positions a program similar to the one which had previously been applied to the hourly workers positions. (Ex. P-4) In the July, 1950 issue of the United States Steel News reference was made to the job inequity program as it was initiated in 1944 pursuant to a directive of the National War Labor Board which defined in detail the purpose and mechanics of

the program and further stated, "other employees will receive increases, part of which are amounts set aside and not heretofore paid to them when general wage increases were negotiated in 1948." (Ex. P-14 Page 33) It will be recalled that in the letter dated August 3, 1948 after announcing the inequity program it stated an "increased increments cost comparable to that granted to wage earners will be reserved for distribution through retroactivity of the salary rate inequities program for the period commencing July 16, 1948." (Ex. P-3)

The Respondent some time prior to October 17, 1950 was asked to prepare a job description of the particular position which he held. (R. 142-143) Thereafter a copy of the job description as prepared by the industria engineers was submitted to the Respondent for his approval. The Respondent testified that the initials ERR in the upper right hand corner on Exhibit P-9 are his initials placed there by him. (R. 142) On November 27, 1950 the final approved job description was prepared. (Ex. P-10)

As stated in the Appellant's brief and at the time of pre-trial and as urged before the jury at the time of trial, it was their contention that the company policy required that an employee to be elgible for retroactive pay in the general office had to be on the payroll on the effective date of the evaluation plan. (R. 72) It will be noted that as to all other employees, union or non-union, and even as to non-exempt salaried employees not represented by the union in the mill, retroactive payments were made whether said employees were on the payroll on the effec-

tive date or not. (R. 72) In support of this contention the Appellant introduced Exhibits D-15 and D-16 being letters to the various department heads advising them that as to non-exempt salaried employees a general increase was being granted and that a job evaluation program was under way which provided for retroactive pay back to March 9, 1947 and which further provided that it would apply only to employees on the payroll. It should be noted that this letter is dated December 15, 1950, two weeks after the Respondent had left the employment of the Company. It is the Respondent's contention that an implied in fact contract, based upon the prior custom and upon the publications and notice of the job evaluation program, had been formed by his continuing to work since August 3, 1948 with knowledge of such custom and publications, and that the contract could not subsequently be modified by the unilateral action of the company by specifying an additional requirement not heretofore involved in connection with the prior three reclassification programs. The letters announcing such a requirement were intended to be a statement of an interum policy policy and were superceded when the policy and procedural mannual was finally issued which defined in particular the "former employees" who would be entitled to receive pay. (R. 112) The Policy and Procedural Manual, Exhibit P-12, issued June 1, 1951, effective June 3, 1953, paragraph 6 entitled "Lump Sum Payments" for the retroactive period provided as follows:

"Lump Sum Payments for the Retroactive Period.

> 6.1 For the purpose of Paragraph 6.3 below, the term "employee' shall mean an employee on the payroll of the Company, or an affiliated Contract Company of United States Steel Company, on the date the standard salary scale becomes effective who since March 9, 1947, worked on a job covered by this Policy. A "qualified former employee" as determined by the Salary Administration Committee, shall be eligible for retroactive lump sum adjustments who: (a) since March 9, 1947, worked on a job or jobs covered by this policy; but (b) is not on the payroll of the Company or an affiliated Contract Company of United States Steel Company on the date the standard salary scale becomes effective; and (c) files individually signed request for individual lump sum payment in writing with the Company on or before August 17, 1951."

It will be noted that no place in this requirement is it stated that to be a "qualified former employee" the applicant must be on the payroll on the effective date. The very term being defined "qualified former employee" and caluse (b) indicates that the applicant would not be on the payroll on the effective date. It was further testified that the policy procedural manual adopted by the Geneva Steel Company was patterned after a policy procedural manual of the United States Steel Corporation of Delaware and that manual was used as a guide for the adoption of the manual for Geneva Steel. (R. 86) The same numbered paragraph on the same subject matter from the policy procedural manual of the Delaware corporation states as follows:

> "*****and the term "qualified former employee" shall be understood to mean an individual (*except an individual who quit or was discharged*) who: (a)" (emphasis added).

Thereafter comparable provisions to the (a), (b), and (c) requirements contained in the Geneva Procedural Manual are set out. It is obvious that the manual of the Delaware Corporation specifies the requirement asserted by Appellant. But it is equally obvious that the salary administration committee at Geneva in adopting the provisions for their own manual excluded that provision from the manual. It was the Respondent's contention therefore that the company did not intend to prohibit former employees from receiving their retroactive pay. To further show that it was the company's intention to treat non-exempt salaried employees either in the general offices or in the mill as well as union employees on identically the same terms, the Respondent submitted Exhibit P-7 being a news release from Mr. L. J. Westhaver, Geneva Vice-President and Manager of Operations wherein he announced that salaried clerical and technical employees of the Geneva Steel Company who worked in plant areas other than the headquarters offices would receive their checks for retroactive salary payments, and then he stated:

> "similar retroactive payments are to be made at some future date for similar workers in the headquarters offices of the plant."

Exhibit P-5, a notice placed on the bulletin boards, after

announcing retroactive pay for salaried employees represented by the union, both as to employees on the payrolls and for employees who had terminated their employment stated:

> 'Salary rates and retroactive pay of non-exempt salaried employees of the Geneva Plant not subject to the bargaining unit *will be established and computed in the same manner.*" (emphasis added)

Exhibit P-11 is a worksheet prepared by Geneva Steel Company entitled "Salary Inequities" which sets forth the respective weekly pay periods in which the Respondent worked for the Appellant and shows the rate of pay which he was paid and the rate of pay which the position under the new classification should have been paid for the particular period of time. It is from this exhibit and computation sheet that it was calculated that the Respondent if he were entitled to the retroactive pay would have received the sum of $1,574.17. It is obvious from this computation as well as from the fact that it is classified as wages and pro-rated during the respective years for tax purposes that the computations were made on the basis of wages earned and that the amount paid was not a mere gratuity as often contended by the Appellant.

In *Powell et al v. Republic Creosoting Co.*, 19 Pac. 2d 919, 172 Wash. 155, the Respondent sued the Defendant company for an additional amount owing for services rendered. It appeared that the Respondent had been an

employee of the defendant company for a period of years and during that period of time he had received, in addition to his base salary, a substantial bonus averaging an amount from 25% to as high as 63% of his stated salary. The Respondent resigned his position on December 1, 1930 and was suing to recover a proportionate share of a bonus comparable to an amount paid the preceding year.

The Respondent contended, and the trial court held, in effect that the course of dealings was sufficient to constitute an implied contract between the Respondent and the Appellant that the Respondent should be compensated in addition to his regular salary by an adjustment at the end of each year. The court in affirming the judgment stated as follows:

> "It does not necessarily follow that the total compensation earned by the respondent in 1930 must equal or exceed the total in 1929, because results were a factor to be taken into consideration each year in determining the value of respondent's services. The appellant might have pleaded and proved, if such were the fact, that respondent's services resulted in less profit to the company in the last year, or even that the profits of the company fell off without fault on the part of any one, thus making the business as a whole less prosperous, less able to pay, less profitable to its stockholders and all concerned, and of course the services of every one connected with it would under those conditions be less valuable than in the years of prosperity. Nothing of this kind was even suggested in the pleadings or

hinted at in the testimony. On the contrary, it was shown that other branch managers received larger bonuses in the year 1930 than they did in the year 1929.

"Respondent relies upon the case of Scott v. J. F. Duthie & Co. 125 Wash. 470, 216 P. 853, 28 A. L. R. 328, and similar authorities. Appellant argues that these cases are based upon express contracts and are therefore not applicable here. We are not advised that implied contracts differ in any degree from express contracts in the requirements as to mutuality and consideration. Here, as in the Scott Case, we can find both mutuality and a sufficient consideration to support the contract.

"As early as 1919, by conduct which was thereafter continued, the employer began to hold out to the employee the offer or implied promise that, if he would continue in the service (which he was not otherwise required to do), his compensation would be adjusted annually on a basis of reasonable value. The employee accepted the offer by continuing in the service; hence there was mutuality and a consideration moving to the employer just as in the Scott Case, supra. In discussing this question, it was there said: 'The promise here was therefore no "nudum pactum" on that theory, nor is it one on the theory that the promise was one for additional pay to be given one already under contract to do the very work for which the additional pay was promised. The argument that the appellant cannot recover the bonus for the reason that he was paid his regular salary while in the respondent's employ overlooks the very idea conveyed by the word "bonus", which is "an allowance in addition to what is * * * stipu-

lated." Standard Dictionary. The complaint shows that the appellant was free to quit his work at any time, and therefore was under no obligation to do the thing which the respondent was seeking to accomplish by its offer. The compliance with the terms of the offer created a contract supplementary to the contract of employment. By this supplementary contract the respondent agreed to reward the appellant for remaining in its employ and refraining "from accepting employment elsewhere until this company shall complete the ships."'

"We conclude, therefore, that the trial court did not err in holding that respondent was entitled to compensation in the year 1930 at the same rate as was received in the year 1929.

"The judgment is affirmed."

An Annotation entitled, "Requisities as to definiteness of agreement to pay employee share of profits" in 18 A. L. R. 2d 211 states as follows:

"The authorities make it clear that the question of whether a profit-sharing agreement, uncertain in that it fails to set forth the extent of the employee's share, is sufficiently definite to bind the employer is not susceptible to rule-of-thumb solution. On the contrary, although the courts uniformly recite the rule that contracts must be definite, the compliance or noncompliance with this rule by an individual promise by an employer to share profits with his employee is most often, if not always, determined from a consideration of all surrounding facts and circumstances. And the courts have shown a tendency to grant recovery, if that can possibly be done, to an em-

ployee who has proved the making of the profit-sharing promise and who has acted in reliance thereon.

"Illustrative of the tendency mentioned above are the cases treated herein which the courts have held that the test of definiteness is met where an employer promises to pay his employee a share of profits from a particular enterprise, or a 'fair and equitable share' of profits, or up to, but not to exceed, a specified percentage of profits, as well as those in which by reference to the employer's earlier practices certainty has been found in the share to which the employee is entitled. It has also been suggested that an apparently indefinite profit-sharing agreement can be rendered sufficiently definite by consideration of the agreement in light of custom applicable to the parties."

One of the cases annotated in the above cited annotation is *Snyder v. Hershey Chocolate Co.* (1916) 63 Pa. Super Ct. 528. In this case the company had been accustomed to paying the employees a share of its profits. In holding that the plaintiff could enforce payment of a share of the profits, the court states:

"We may assume that the payment of the additional wages was dependent upon the success of the business and that there was no absolute promise to pay a definite sum contained in the letter above referred to. What amount was to be distributed was to be determined by the board of directors. It was certain that the workmen were to have a share in the profits, if any were made. This was the inducement to the men to continue in the company's employ. In other words, the

> promise was that at the end of the year there would be some distribution of profits, if any were made, and after the company fixed the amount which was to be distributed, then that which was indefinite became definite and all the laborers employed by the company who had taken employment under the promises to share if they continued to work during the year, were entitled to receive their extra compensation fixed at 20 per cent of their wages during the year. The company offered this as an inducement to the laborers to continue in its employ and this purpose being consummated by a fixing of the amount of the extra compensation, all the elements of a valid contract were present."

The Appellant in the present case should not be heard to complain that the contract cannot be enforced because of indefiniteness. The Respondent maintained that there was a definite contract to pay him retroactive pay when the job classification program was completed in such amount as the classification would determine should be paid for the position which he held. He does not now challenge the computation of this amount as contained in Exhibit P-11. It is assumed that the industrial engineers acted in good faith in arriving at the classification assigned to the position held by Respondent. The fact that the amount which would be paid Respondent could not be ascertained at the time of the formation of the contract does not invalidate the contract if the procedure to be followed is sufficiently detailed and after the classification has been made the amount then can be readily ascertained. Exhibit P-1, being ex-

cerpts from the publication of United States Steel News, states six steps which shall be followed and explains in detail how the reclassification program will be conducted. The respondent, according to his contract, could only insist that the program be followed in good faith as outlined. If as a result of the reclassification, it developed that the position he held was being overpaid, he could not complain. On the other hand, if it developed that the position he held should have been paid an additional amount, he was entitled to receive retroactive pay compensating him for this differential. The contract was definite from the beginning; the amount became definite after the completion of the program. The Respondent has never challenged or contested the amount as computed in Exhibit P-11 by employees of the Appellant.

In an annotation entitled, "Right of employee to bonus as affected by termination of employment before bonus becomes payable", in 28 A. L. R. 346 it is stated as follows:

> "In the absence of special considerations, it seems reasonable to hold, as several of the cases cited below do hold, that assuming that there is a valid and enforceable promise through the offer of a bonus and acceptance by the employee's continuing in the service, if the employment is terminated by mutual consent of the parties or by the act of the employer through no fault of the employee, the latter should be entitled to a proportionate share of the bonus, according to the time served, even though there was no time fixed for

the duration of the employment, and it could, therefore, be terminated at will."

In this case the Respondent worked for the Appellant the entire period for which retroactive pay was to be paid, namely from March 9, 1947 to December 1, 1950. There was no attempt to impose a time limitation with which the Respondent must comply to be entitled to the retroactive pay until after the expiration of this period. More particularly, December 15, 1950 (Ex. D-15 and 16) was the first time any mention was made that an employee to be eligible for retroactive pay would have to be on the payroll on the effective date of the new classification. As contended by the Appellant, to which the Respondent could not object, and as the court instructed the jury, no fact or circumstance after December 1 could be considered in connection with the formation of the contract or the terms thereof.

The only case cited by the Appellant in support of their position is the case of *Pyeatt v. El Paso Natural Gas Company* (N. Mex. 1950) 213 Pac. 2d 436. This case merely affirmed the trial court's holding that under the facts there presented there had been no reliance upon the offer made by the company. More particularly, the court stated that the employee had not continued working for the company in anticipation of any wage increase, but rather that the employee had purchased a farm and it was his intention to only remain with the company until such time as it was necessary for him to operate the farm the following year. The offer to the employees was a conditional offer only, to the effect that they would receive a

pay increase if approved by the War Labor Board. The condition was not performed until after the employees had terminated their employment with the company. The most that can be said about this case is that it affirmed the holding of the trial court which had made an adverse decision on the facts to the employees there involved. The rule there established should likewise be followed in this case and the finding of the jury should now be affirmed.

In an annotation in 100 A. L. R. 969 at 985 the general rule, without citation of dissenting authority, is stated as follows:

> "Where the existence of a contract is to be made out, if at all, from evidence of the acts of the parties and surrounding circumstances, as construed in connection with informal writings, and where, from such acts and circumstances opposite inference may be drawn as to the existence of some fact essential to the contract, a jury question is presented."

It is respectfully submitted that the court properly permitted the jury to determine whether the facts and circumstances in this particular case were sufficient to establish an implied contract between the parties. The jury having determined this factual issue in favor of the Respondent, it is manifest from the testimony in the above-entitled action that there was more than sufficient competent evidence to justify the determination of the jury.

POINT TWO

The court did not err in admitting evidence of acts by the company subsequent to November, 1950, nor did the court err in giving instruction No. 10 pertaining to evidence of acts of the employer subsequent to November, 1950, at which time plaintiff's employment had ceased.

The Appellant in Points Two and Three urges that the court erred in admitting certain exhibits and evidence of facts and circumstances which occurred after December 1, 1950. Such evidence was stated to be Exhibits P 7-13 inclusive. The record discloses that the Appellant only objected to the introduction of one of these exhibits. As to Exhibit 8, a letter of April 2, 1951 to the government requesting authority to adopt the retroactive plan, no objection was made to the admissibility of that document. (R. 94) In fact, the Appellant relied upon the language contained in the document in support of its contention. (R. 114) Nor was any objection made to the introduction of Exhibit P-9 (R. 143), Exhibit P-10 (R. 94), Exhibit 12 and 13 (R. 96) and apparently Exhibit P-11 was received by stipulation. (R. 61) Furthermore Exhibit P-9 was dated October 17, 1950 and was a copy of a job description submitted to the Respondent for his approval while he was working for the company. Exhibit 10 was dated November 27, 1950, also during the term of the employment of the Respondent. If the other exhibits dated after December 1, 1950 are immaterial, then so are the Appellant's exhibits D-15 and D-16, both dated December 15, 1950. These exhibits are the letters upon which the Appellant rests in defense that em-

ployees had to be on the payroll on the effective date of the program in order to receive retroactive pay.

Only one of the exhibits specified in the argument of this point was objected to and that was Exhibit P-7 and part of the objection to that exhibit was that it was irrelevant and immaterial since it did not apply to the general office except as follows: "Similar retroactive payments are to be made at some future date for similar workers in the headquarters officers of the plant." This statement was also claimed to be immaterial since it was stated by counsel for Appellant that there was no issue concerning the same. If there had been no issue as claimed by the Appellant on this question, the matter might have been irrelevant and immaterial, but the very claim of the Appellant that the Respondent had to be an employee on the payroll on the effective date shows that a similar program was not being applied to the general office employees since that requirement had not been specified as to any other group of employees. It was the Respondent's contention that this document was material to aid in the construction of the requirements placed in the policy procedural manual relied upon by the Appellant and to show by the company's own construction it was its intention to apply identically the same program to the general office employees. The other part of the Objection made to this one exhibit was that it occurred more than four months after the plaintiff had quit. The court to guard against any possible assertion that this document could be used as part of the foundation for an offer made to the Respondent instructed the jury in In-

struction No. 10 as follows: "You are instructed that in determining whether defendant made an offer to plaintiff to make a retroactive adjustment you are not to consider any statement or act made or done after December 1, 1950; * * *"

The Appellant on appeal objects for the first time to the introduction of Exhibit P-8, a letter which it relied upon as specifying the requirement that the employee had to be on the payroll. The Respondent introduced this document to identify Exhibit P-5 which was a notice placed upon the bulletin boards for the employees of the company to inspect. This notice announced the completion of the program as to salary workers in the mill and specified that retroactive payments would be made to March 9, 1947. The notice further specified that former employees would receive their retroactive pay and then stated, "Salary rates and retroactive pay of non-exempt salaried employees of the Geneva Plant not subject to the bargaining unit will be established and computed in the same manner." It will be noted that this paragraph says at the Geneva Plant. A pencil indication on the bottom of said notice states, "Posted in each plant on bulletin board for a period of one week commencing on or about December 1, 1950." As has been previously stated the Appellant takes the position that when referring to the Geneva Plant they are talking about the operations inside of the fence and not the general offices. However, in its letter to the government dated April 2, 1951, Exhibit P-8, it is stated that a retroactive pay program had been com-

pleted for non-exempt salaried personnel at the Geneva and Ironton Plants and that as part of the overall program,

> "it was our intention to apply a similar inequity study to the non-exempt personnel who are within the general office group, which would include also non-exempt salaried personnel at the quarry and the coal mines."
>
> "A notice was posted on or about December 1, 1950 throughout the general locations in which these groups of employees are working advising them that such a program would be inaugurated and placed into effect at the earliest possible time, a copy of this notice is attached."

It was admitted that Exhibit P-5 was the notice referred to in the letter of April 2, 1951 and by the terms of that letter it distinctly states that this notice was placed on the bulletin boards where it could be observed by employees in the general office group. It is therefore obvious that the company as well as employees have used and understood the term "Geneva Plant" to refer to the entire operations located at what is known as Geneva, Utah or the steel plant in Utah County.

Exhibit P-7, the only exhibit of the above group which Appellant objected to at the trial, is material to rebutt this alleged distinction. In this Exhibit Mr. L. J. Westhaver is quoted as follows: "He said similar retroactive payments are to be made at some future date for

similar workers in the *headquarters offices of the plant.*" (italics added)

Since the Appellant at the trial stated there was no objection to the introduction of the fore-mentioned exhibits, except as to Exhibit P-7; since Exhibit P-7 was admissible for independent reasons not connected with the making of an offer by the company; and since the court instructed the jury not to consider any statement or act made or done after December 1, 1950 in determining if an offer had been made, the Appellant cannot conscientiously maintain that the court erred in this regard.

CONCLUSION

The Appellant may feel that it is proper to attempt to deny the claim of the Respondent even though it must recognize that the Respondent did not receive a general pay raise for a period of approximately 2 and ½ years while the job evaluation program was being conducted and even though it has received the benefit of the employee's labor during that period of time. The Appellant may also feel that it is proper to belittle the claim of the Respondent and to flippantly treat it and classify it as was done in their brief as, "confusion, confusion, confusion." Mr. Heald, executive secretary of the company and associate general counsel, stated, "it was our determination that the company would receive the most benefit from such a program by applying the program to employees of the company, not former employees of

the company, those gentlemen were gone and presumably had left the company for reasons sufficient for themselves." Considering the long period of time from July 16, 1948, when the program was announced, to June 3, 1951, when the program was made effective, and the number of employees who had terminated employment with the company, it can readily be seen how "the company would receive the most benefit" from attempting to cut off retroactive pay to such employees.

It is respectfully submitted that the Respondent was justified in relying upon the custom acknowledged by the head officers of the company to the effect that all employees would receive comparable pay benefits. He was justified in believing that as soon as time would permit, the classification program would be applied to the general office employees. All communications indicated that the program would be identical. It was common knowledge that the program was being carried out. Not until December 15, was any communication made which would indicate that there would be a new and different requirement which would be applied to general office employees. At this time it is submitted the contract had been formed and could not be unilaterally modified. It is further submitted that when the company finally adopted the plan and put it into effect on June 3, 1951, as specified in the Policy Procedural Manual, it specifically deleted any such requirement by not following either verbatim or in substance the guide as set out in the Policy Procedural Manual of the Delaware corporation, which

included such a requirement. It is therefore respectfully submitted that, viewing the evidence in the light most favorable to the Respondent, the verdict of the jury and the judgment entered thereon should be affirmed.

Respectfully submitted,

DAN S. BUSHNELL,
Attorney for Respondent.